

June 9, 1998

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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**REPORT AND RECOMMENDATION ON REZONE APPLICATION
AND DECISION ON SEPA THRESHOLD DETERMINATION.**

SUBJECT: Department of Development and Environmental Services File No. **L98RZ002**
Proposed Ordinance No. **97-661**

JOHN LEIN

Rezone Application and SEPA Threshold Determination Appeal

Location: South side of SE Main Street, between 232nd Avenue SE and
236th Avenue SE (if extended)

Proponent: King County, *represented by*
Barbara Heavey
DDES/Environmental Division
900 Oakesdale Avenue SW
Renton, WA 98055-1210
(206) 296-7222 Facsimile (206) 296-7051
and
Karen Scharer
DDES/Land Use Services Division
900 Oakesdale Avenue SW
Renton, WA 98055-1210
(206) 296-7114 Facsimile (206) 296-7051

Property Owner: John Lein
23205 East Main Street
Redmond, WA 98053
Represented by:
Bob Johns and Michael Monroe
Reed McClure
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 292-4900 Facsimile (206) 223-0152

Appellants: Richard T. Wheeler and Janet Irons-Wheeler
Law Offices of Janet Irons
1001 – Fourth Avenue Plaza, #4317
Seattle, WA 98154
(206) 389-1757 Facsimile (206) 389-1767

SUMMARY OF RECOMMENDATIONS AND DECISION:

Rezone Application

Department's Preliminary:	Approve elimination of P-suffix conditions
Department's Final:	Approve elimination of P-suffix conditions
Examiner:	Approve replacement of existing P-suffix conditions with new condition

SEPA Threshold Determination

Department's Preliminary:	Deny appeal
Department's Final:	Deny appeal
Examiner:	Deny appeal

PRELIMINARY MATTERS:

Rezone application initiated:	December 15, 1997
Notice of SEPA appeal received by Examiner:	March 3, 1998
Statement of SEPA appeal received by Examiner:	March 3, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	April 2, 1998
Hearing Opened:	May 21, 1998
Hearing Closed:	May 21, 1998

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Wildlife corridors
- Wetlands
- Environmental regulations

FINDINGS, CONCLUSIONS, RECOMMENDATION AND DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Parcels:	3425069091 & 3425069009
Location:	23205 Main Street, Redmond, south of Main Street, between 232nd Avenue SE and 236th Avenue SE
STR:	Section 34, Township 25N, Range 6E
Zoning:	R6SO (9091) & R6PSO (9009)
Sewage Disposal:	Sammamish Plateau
Water Supply:	Sammamish Plateau

Fire District: Issaquah
School District: Lake Washington

2. Except as modified herein, the facts set forth in the King County Land Use Services Division Preliminary Report to the King County Hearing Examiner for the March 5, 1998 public hearing, as amended by the Addendum Report filed for the May 6, 1998 hearing, are found to be correct and are incorporated herein by reference. Copies of the LUSD Reports will be attached hereto for submittal to the Metropolitan King County Council. The LUSD Staff recommends removal of the two P-suffix conditions at issue as they apply to the subject parcels.
3. The reclassification of two contiguous 20-acre parcels, Tax Nos. 3425069091 and 3425069009, was initiated December 15, 1997, by the King County Council under authority of Motion No. 10370. The motion recites the history of zoning and Comprehensive Plan changes which have affected these two parcels since the 1993 East Sammamish Community Plan update and directs the Examiner to consider whether the P-suffix conditions applicable to the two parcels continue to be appropriate.
4. A detailed legislative history for the two parcels is set forth within the LUSD Staff Reports. Briefly, in 1993, the easterly 20-acre parcel, Tax Lot 9091, was zoned RS-7200, while the westerly parcel, Tax Lot 9009, was zoned GR-5 with a S-C potential zone. In general, under the former zoning code the GR classification operated both as a holding designation designed to avoid premature urban development in areas without adequate roads, schools and utilities, and also as a mechanism to preserve environmentally sensitive areas. The expectation was that the actual division of the property would likely occur under the designated potential zone, which in this instance would permit lot clustering to achieve an average density of one dwelling unit per acre, with at least 50% of the site placed within a reserve tract for either permanent open space or possible future redivision.
5. In 1994, under the new Comprehensive Plan both parcels were designated Urban Residential. During the 1995 zoning conversion process, Parcel 9009 was zoned R1P, while Parcel 9091 was converted to R6P. The conversion of Lot 9009 appears to have been based upon its underlying potential zoning rather than the GR-5 holding zone. For both parcels, the Community Plan P-suffix conditions were carried forward. Finally, on January 1, 1996, under authority of Ordinance 12061, Parcel 9009 was rezoned from R1P to R6P, a redesignation from low to medium urban density which occurred during an annual Comprehensive Plan update process unrelated to the area-wide conversion project. Again, however, the Community Plan P-suffix conditions were retained.
6. These two parcels are now back before the Council under a proposal to remove the two P-suffix conditions concerning Wetland Management Areas and Wildlife Corridors/Urban Separators from Parcel 9009 and the Wetland Management P-suffix condition from Parcel 9091. The question of whether this would be an appropriate action has two dimensions, a legal and an environmental. The legal question is whether the prior redesignation of these two parcels as R6 already has had the effect of making the two P-suffix conditions at issue inoperative. The environmental issue is whether the various Comprehensive Plan and zoning redesignations which have affected the Lein property since 1992 will result in an unacceptable reduction in the level of environmental protection afforded these two parcels unless the P-suffix conditions at issue are retained in some form. The environmental issue requires an examination of the degree to which

- the currently-applicable P-suffix requirements are duplicated by other zoning and plan provisions which would apply to the property regardless of whether the P-suffix conditions were removed. Where current generally-applicable provisions provide for a lesser degree of regulatory control, the question becomes whether the special environmental characteristics of this area require a greater level of protection than that afforded by the standard regulatory requirements.
7. A threshold determination of non-significance was issued for this rezone proposal on February 6, 1998. This determination was appealed by area residents Richard T. Wheeler and Janet Irons Wheeler, who contend that deletion of the P-suffix conditions relating to the Wetland Management Area Special District Overlay and the Wildlife Corridor/Urban Separator would inadvertently result in the reduction of development restrictions on the property in a manner which would cause significant adverse environmental impacts.
 8. Wetland Management Area No. 9, as designated within the East Sammamish Community Plan Update of 1993, encompasses the northern two-thirds of Parcel 9091 and the northeast quadrant of Parcel 9009. In its current version as SO-180, the Wetland Management Area Special District Overlay, the P-suffix condition applied to the two Lein parcels under its maximum potential application would limit impervious surfaces within any new subdivision to 8% of the gross acreage of the plat; require plat lots to be clustered away from wetlands and streams; require 50% of the site to be left in native vegetation within a permanent open space tract; and limit clearing and grading activity to the dry season. As written, however, SO-180 only applies the 8% maximum impervious limit and the 50% native open space requirement to sites zoned R1, which designation is no longer currently appended to either parcel. As noted by Staff, the clearing and grading seasonal limitations apply to the property with or without the P-suffix condition, leaving only the clustering provision of SO-180 as clearly and uniquely applicable to the property under its current zoning.
 9. ES-P20, the Wildlife Corridor/Urban Separator P-suffix condition, has only been placed upon the western parcel, Tax Lot 9009. Under its terms, 50% of the site would be required to remain in undisturbed open space in locations designed to maximize continuity within the wildlife corridor/urban separator designation on adjacent properties and within the Community Plan. The P-suffix condition also requires a management plan for the open space tract and the augmentation of SAO-required stream or wetland buffers with an additional 50 feet of protection on all edges, with the ultimate goal being to provide a 300-foot-wide undisturbed corridor.
 10. LUSD Staff and the property owner argue that none of these provisions are currently applicable to Parcel 9009 because the introductory text for ES-P20 limits its applicability to "all parcels of land within the S-C zone lands shown on the area zoning map". The Staff and property owner argue that because S-C was never an actualized zone on this property, the P-suffix condition by its terms does not apply to Parcel 9009. They further contend that even if the S-C reference might formerly have applied to Parcel 9009, it no longer does so since its rezone to R6. The appellants, on the other hand, point out that the S-C potential zoning appears on the area zoning map for the 1993 Community Plan Update, the significance of which is buttressed by the fact that within the conversion process the parcel was governed by its S-C potential zone in converting to R1 rather than following the GR5 track which would have led to conversion of the property to Urban Reserve.

11. Following the adoption of the East Sammamish Community Plan, a parallel policy review of the Wetland 9 Management Area also occurred within the East Lake Sammamish Basin Plan enacted in November, 1993. Basin Plan Policy BW-5 identifies certain Class 1 wetlands and their tributary areas where low densities should be maintained and impervious coverage limited in order to achieve resource protection. The specific policy recommendations for Wetland 9 and its management area generally duplicate those within the Community Plan, except the Basin Plan Map is more precisely drawn than that within the Community Plan and includes a smaller portion of the Lein property within its regulatory limits. In addition to the land use restrictions specified by the Community Plan, the Basin Plan also places stricter drainage requirements on development detention systems and surface water release rates.
12. If one assumes that the requirements of ES-P20 do in fact apply to Parcel 9009, deletion of the P-suffix condition from the property would have the primary effect of removing the site from operation of the 50% open space requirement. If one also assumes that the creek across the Lein property is a Class 3 stream, adding 50 feet on either side of the SAO-required buffer results in a total protected width of 150 feet, which equals the minimum wildlife corridor which would be required regardless of the P-suffix condition under the provisions of KC21A.14.260 and .270. The provisions of KCC 21A.14 also require a management plan and authorize wildlife corridors to be expanded to a maximum of 300 feet, both of which provisions largely parallel the P-suffix condition.
13. Wetland No. 9 follows an east-west axis and lies just north of the Lein parcel, with a small lobe of the wetland as mapped within the East Sammamish Community Plan shown extending onto the northwest corner of Parcel 9009. An unclassified stream runs from south to north from about the southwest corner of Parcel 9091 through Parcel 9009 and across its northern boundary into Wetland No. 9. The stream is landscaped and augmented with a small ornamental pond; in the absence of any evidence of salmonid use it would probably receive a Class 3 designation under the Sensitive Areas Ordinance.
14. Most of the useful information concerning Wetland No. 9 and its system is found within the Community and Basin Plans. The East Sammamish Community Plan Update relates that Wetland No. 9 comprises 55 acres with four sub-classes of vegetation and lies on the boundary between the East Lake Sammamish and Evans Creek basins. The Plan also tells us that two of its sub-classes, the forested with western red cedar and the scrub-shrub with labrador tea, “should be considered particularly sensitive to alterations of existing wetland hydrology, particularly to increases in the frequency and duration of inundation”. The wetland supports a diversity of plant and animal species and is considered critical for maintaining stable stream channels both through surface water run-off storage and groundwater recharge.
15. The general discussion of wetland protection within the East Lake Sammamish Basin Plan identifies policy goals within wetland catchment areas, including the limitation overall of total impervious surface to about 10% and total urban development to under 50%. If these development limitations are achieved, the Basin Plan anticipates being able to maintain “critical aquatic resource functions including natural hydrologic functions”. The specific discussion within Section 5.2 concerning the Inglewood Sub-Basin notes that this sub-basin is heavily zoned for urban development and is “predicted to result in the largest flow increases of any sub-basin in the planning area, if no mitigation is provided.” In this context, reduction of impervious surfaces will allow the hydrologic function and continuity of Wetland No. 9 to be maintained and mitigate the massive

increases in downstream flows that otherwise are predicted to occur. At the public hearing, a sidelight to the discussion of Basin Plan Policy BW-5 and its attendant wetland development restrictions was the fact that DDES Staff appears unable to decide whether BW-5 is to be regarded as a firm regulatory requirement or simply as policy authority for the application of SEPA conditions.

CONCLUSIONS:

A. **Rezone Proposal.**

1. With respect to the purely legal question of whether as written the P-suffix conditions by their terms apply to the Lein parcels in their present zoning state, we agree with the interpretation offered by LUSD Staff in its Addendum Report with respect to the effect of Condition SO-180, the Wetland Management Area Special District Overlay. By its terms, SO-180 only applies its 8% impervious limitation and 50% open space requirements to R1-zoned properties. Since the critical references are to current zoning code designations, with no mention of site history as a factor to be regarded, the R1 limitation should be considered effective. Consequently, the only new regulatory loss that would result from a deletion of the P-suffix condition would be the somewhat vague requirement to cluster away from wetlands or stream corridors. In summary, since Parcel 9091 was never zoned R1, after conversion most of SO-180 never applied to it, and most of SO-180 ceased to apply to Parcel 9009 when it was rezoned in 1996 to R6.
2. The applicability of ES-P20, the Wildlife Corridor/Urban Separator P-suffix condition, to Parcel 9009 is less clear. Here the critical reference is not to the current zoning system but rather to “S-C zoned lands shown on the Area Zoning Map”, a reference to the historical status of such parcels under prior zoning. If Parcel 9009 was an S-C zoned land in 1992 as shown on the Area Zoning Map, such fact would not be altered by its later rezone to a higher density inconsistent with the S-C designation. Since the 1993 Area Zoning Map shows Parcel 9009 as carrying both a GR5 and an S-C designation, the parcel falls within the literal language of the ES-P20 text, even though the S-C designation in 1993 was a potential zone. The 1993 Map does not distinguish between potential and actual zones; therefore it provides no basis for regarding the S-C reference as ineffective for purposes of ES-P20. Indeed, looking simply at the Zoning Map as directed by the P-suffix condition, one would likely regard the S-C designation as primary and the Growth Reserve designation as an overlay, an interpretation which is consistent with the GR zone’s function as a holding mechanism and with the conversion of Parcel 9009 to R1 under the 1995 code. Under this interpretation, therefore, deletion of ES-P20 from the P-suffix conditions applicable to Parcel 9009 would have the important regulatory effect of removing the 50% undisturbed open space requirement.
3. Turning from a purely legalistic analysis of the regulatory history of these two parcels to a substantive consideration of the environmental issues to be entertained, it is clear that two major environmental policy initiatives continue to be applicable to these properties. One is the Wetland No. 9 Management Area as further refined within the East Lake Sammamish Basin Plan policies, and the

second is the regulatory Wildlife Corridor which connects across the Lein properties from the south into Wetland No. 9 following the unclassified stream.

4. Although it is our view that ES-P20 still applies to this property on the basis of the 1993 zoning map, we are satisfied that the current provisions within KCC 21A.14 for establishing wildlife corridors are adequate to preserve essential environmental functions. We also are of the opinion that the 50% open space requirement, to the extent that it is environmentally based, need only be applied to those areas of the site which are mapped for such treatment within Figure 5A of the Basin Plan. A 50% open space requirement applied to the entire area of Parcel 9009 would primarily serve the urban separator concept, which we understand to be more of a planning construct than an environmental requirement. Therefore, so long as open space and impervious surface requirements are applied consistent with the Basin Plan, those portions of the site lying outside of Basin Plan protective boundaries need not be exceptionally restricted unless they fall within the designated wildlife corridor.
5. Similarly, with respect to P-suffix Condition SO-180 we conclude that the County's wetland management environmental policies can be adequately accomplished if impervious area restrictions and open space requirements are applied to those portions of the property so mapped within the Basin Plan. No case has been made on environmental grounds for the extension of such requirements to the remainder of the two parcels beyond the boundaries set by Figure 5A. Accordingly, the rezone recommendation will be to repeal the two existing P-suffix conditions relating to Wildlife Corridor/Urban Separators and Wetland Management Special District Overlay and replace them with a P-suffix condition making compliance with the Basin Plan's provisions mandatory. In addition, the proposed condition recognizes that the Basin Plan, Sensitive Areas requirements, and Wildlife Corridor provisions may combine to preclude attainment of zoning density requirements, and that such a conflict (if it arises) should be resolved by permitting DDES to account Basin Plan, Open Space and Wildlife Corridors as sensitive areas for the purposes of minimum density calculations.
6. Since the last area zoning for the Sammamish Plateau conditions and circumstances of a regulatory nature affecting the subject property have undergone substantial and material changes not anticipated or contemplated within such previous zoning review. Moreover, due to its location, these changed circumstances affect this property in a manner and degree different from other properties in the vicinity. The proposed reclassification will serve the public necessity, convenience and general welfare. No additional P-suffix conditions applicable to the parcels will be affected by this action other than the two specifically identified and designated.

B. SEPA Threshold Determination Appeal.

7. Because the major part of SO-180 by its terms never applied to Parcel 9091 and became inoperative with respect to Parcel 9009 in 1996 when the parcel was rezoned to R6, for SEPA purposes there are only minimal legally cognizable adverse environmental consequences attendant to removing at this point in time this P-suffix condition from the two parcels. For the most part, such action is

purely a housekeeping amendment with respect to Parcel 9091, and SEPA review for its removal from Parcel 9009 should have occurred as a necessary adjunct to rezoning the property to R6.

8. On the other hand, our view is that the deletion of P-suffix condition ES-P20 from Parcel 9009 will have a substantial current regulatory effect based on the prior S-C zone mapping for this property, which remains the regulatory trigger for application of this condition. As such, there will be a loss of a 50% open space requirement for the entire parcel, which under our recommendation will only remain in effect under other regulations in the parcel's northeast corner where it lies within Basin Plan mapping containing such a provision. However, comparable protective measures will be applied to the eastern half of Parcel 9009 under Sensitive Areas stream protection requirements, as augmented by the mandatory provision of a wildlife corridor. Therefore, the purposes of the open space requirement insofar as they relate to protecting specific environmental amenities on the property will be substantially met, and deletion of the 50% open space requirement from the unconstrained portions of the site will have an adverse impact that is less than significant. We conclude, therefore, based on the adoption of the replacement P-suffix condition recommended at the end of this Report, that the environmental effects of deleting the P-suffix conditions from the property will not result in a significant adverse environmental impact.

DECISION:

The SEPA threshold determination appeal of Richard Wheeler and Janet Irons Wheeler is DENIED.

RECOMMENDATION:

Delete from Parcel 3425069091 P-suffix Condition SO-180 and from Parcel 3425069009 P-suffix Conditions ES-P20 and SO-180. In lieu of the deleted P-suffix conditions, impose on both parcels the following new P-suffix condition:

“The site development restrictions specified by East Lake Sammamish Basin Plan Policy BW-5 and elaborated in the standards set forth in Wetland Protection Requirement I-2 shall apply to such portions of the site as are identified in Basin Plan Figure 5A. If necessary to accommodate combined Basin Plan, Sensitive Areas, and Wildlife Corridor requirements, DDES shall treat the entire area required to be set aside as a wildlife corridor, as well as 50% of the site area included in the Wetland Management Area shown on Figure 5A, as sensitive areas for purposes of calculating net buildable area and minimum density.”

ORDERED this 9th day of June, 1998.

Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 9th day of June, 1998, to the parties and interested persons shown on the attached list.

NOTICE OF RIGHT TO APPEAL REZONE RECOMMENDATION
AND ADDITIONAL ACTION REQUIRED

In order to appeal the recommendation of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of \$125.00 (check payable to King County Office of Finance) *on or before June 23, 1998*. If a notice of appeal is filed, the original and 6 copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council *on or before June 30, 1998*. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

Filing requires actual delivery to the Office of the Clerk of the Council, Room 403, King County Courthouse, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. The Examiner does not have authority to extend the time period unless the Office of the Clerk is not open on the specified closing date, in which event delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a written notice of appeal and filing fee are not filed within 14 days calendar days of the date of this report, or if a written appeal statement and argument are not filed within 21 calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance which implements the Examiner's recommended action on the agenda of the next available Council meeting. At that meeting, the Council may adopt the Examiner's recommendation, may defer action, may refer the matter to a Council committee, or may remand to the Examiner for further hearing or further consideration.

Action of the Council Final. The action of the Council approving or adopting a recommendation of the Examiner shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the date on which the Council passes an ordinance acting on this matter.

MINUTES OF THE MAY 21, 1998, PUBLIC HEARING ON DEPARTMENT OF
DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L98RZ002 – LEIN:

Stafford L. Smith was the Hearing Examiner in this matter. Robert Johns, Janet Irons, Dr. Kate Stenberg, Nancy Ryan, Karen Scharer, and Barbara Heavey participated in the hearing.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Department of Development and Environmental Services, Land Use Services Division, SEPA Report to the Hearing Examiner for the May 21, 1998 public hearing

- Exhibit No. 2 Determination of Nonsignificance for E98E0017, Proposed Ordinance 97-661, issued February 6, 1998
- Exhibit No. 3 Environmental Checklist dated January 30, 1998
- Exhibit No. 4 Appeal of Determination of Nonsignificance for E98E0017 (Proposed Ordinance 97-661) received February 20, 1998
- Exhibit No. 5 Combined Rezone and SEPA file (submitted at hearing)
- Exhibit No. 6 LUSD Preliminary Staff Report for DDES File No. L98RZ002, March 5, 1998
- Exhibit No. 7 LUSD Addendum Staff Report for DDES File No. L98RZ002, May 6, 1998
- Exhibit No. 8 Memo, from Kate Stenberg, to Sophia Bryd, dated December 5, 1997
- Exhibit No. 9 Resume, Nancy Ryan/Land Use Planner-private sector
- Exhibit No. 10 Map, color-coded, "Wetland Management Area 9"
- Exhibit No. 11 Zoning Map, 1993 East Sammamish Community Plan, Adopted Area Zoning
- Exhibit No. 12 Amendment to the 1994 King County Comprehensive Plan—Land Use Map
- Exhibit No. 13 Situs file information re: John Lein

SLS:gb

Attachment

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